BRIEF FOR PETITIONER

In The United States Court of Appeals for the Ninth Circuit

Nos. 16383, 16401

MORRISON-KNUDSEN COMPANY, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL 341, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside and on Request to Enforce on Order of the National Labor Relations Board

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---

BRIEF FOR PETITIONER

Jurisdictional Statement

This case is before the Court on the Petition of Local 341, International Hod Carriers', Building and Common Laborers' Union of America, Local 341, AFL-CIO, to review and set aside an order of the National Labor Relations Board issued against petitioner and Morrison-Knudsen Company, Inc., issued on January 29, 1959, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC 151 et seq.). In its answer the Board requested enforcement of its order against petitioners. The jurisdiction of this Court is based on Section 10(f) of the Act. The Board's decision and order are reported at 122 NLRB 136.

STATEMENT OF THE CASE

Morrison-Knudsen, Inc., hereinafter called the Company, is an Idaho corporation engaged in the construction business in the State of Idaho and in the State of Alaska.

International Hod Carriers', Building and Common Laborers' Union of America, Local 341, AFL-CIO, hereinafter called the Union, is a labor organization, representing building laborers, hod carriers, tunnel miners, jackhammer operators, wagon-drill men, blasters, powdermen and common laborers, among others, in Alaska.

During the 1956 construction season, the Company was engaged in building intricate facilities at such remote, virtually uninhabited areas as Bethel, Akiak, Galena, Newenham, King Salmon, Anchorage, Fairbanks, Big Mountain, Point Romanzoff and other sites in the State of Alaska (R. 334), for an urgent National Defense system to defend the West Coast from thermonuclear attack. The Company employed more than two thousand employees on all of the projects (R. 329-330), and the hiring of such personnel was performed both at the various job sites and at the Company's main office in Anchorage, Alaska (R. 121, 347).

On October 9, 1956, an individual, Denton Moore, filed a charge alleging in part that "the Company . . . on or about March 15 promised the undersigned and Henry Olympic, Simeon Zacker, Fred Olympic, and others from Kokhanok Bay and Iliamna (and various other local communities) jobs at the White Alice Job Site 2, and on or about June 1, refused to hire us because we were not members of the Construction and General Laborers' Union, Local 341, in keeping with an illegal arrangement with said labor organization, all in violation of Sections 8 (a) (1) (3) of the Labor Management Relations Act of 1947" (R. 5-6).

A second charge was also filed on October 9, 1956, by Denton Moore, and alleged in part, "the above named labor organization, through its officers and agents, by an illegal

arrangement, have caused the Morrison-Knudsen Company at its White Alice Job Site 2 to refuse to hire the undersigned and Chester Wilson of Iliamna, Alaska, Henry Olympic, Simeon Zacker, and William Rickteroff of Kokhanok Bay, Alaska, and various other men from local communities, on or about the first of June, 1956, because we were not members of the above named Union'' (R. 3-4).

On or about August 3, 1957, a consolidated complaint was issued, alleging that,

1. during the six-month period immediately preceding the filing of the charges, the Company and the Union had an unwritten agreement, arrangement, or practice, whereby (a) applicants for jobs as construction laborers were obligated to be cleared by the Union as a condition of hire, (b) the Union was obligated at times to procure employment with the Company for its members in preference to non-members, and (c) the Company, during the 1956 construction season, used the facilities and dispatching personnel of the Union to determine the qualifications of applicants seeking jobs as construction laborers with it;

2. during the aforesaid six-month period, and thereafter, the Company and the Union had a written agreement which permitted the Union to discipline its members in the employ of the Company without limitation;[1]

3. the Union, while functioning as hiring agent for the Company did, on or about June 11, 1956, require eight named applicants for jobs with the Company to seek membership in the Union as a condition of hire and dispatch to the Company's job sites; and

4. under the aforesaid agreements, arrangements or prac-

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[1] The Trial Examiner recommended, and the Board adopted such recommendation, that the allegations that the Company permitted the Union unlimited authority to discipline its members in the Company's employ be dismissed for lack of substantial evidence (R. 29, 81).

tices, the Company refused to treat as eligible for employment as construction laborers at its Big Mountain construction site, any local applicants at Big Mountain until such time as the Union had given preference to its members and to others then accepted as members, who desired dispatch for such employment, and thereby deferring until mid-August the employment of 26 named local applicants.[2]

The evidence adduced at the hearing was concerned primarily with the circumstances surrounding the summer employment of five non-resident college students and the employment of local residents at the Big Mountain construction site. The five students, Maris A. Abolins, Ronald S. Crowe, Joel I. Garnes, Robert Bleek and William Wyman were University of Washington athletes who had been hired for summer employment in Alaska by the Company as a result of requests made to Company by the University Athletic Department with respect to the first four and by a Mr. Everett Noel of the Alaska Freight Lines with respect to Wyman (R. 307, 330).

On June 10, 1956, the first four above-named athletes arrived in Anchorage, Alaska, and reported to the offices of the Company. They were told by Mr. Haugen, a Company official, that they were expected and that they would go through the Union hall and be dispatched to the job site. Mr. Haugen then contacted Harold Groothuis, Business Representative for the petitioning Union, who came over to the Company's office. The five individuals then went into a vacant office where they had a discussion and were given applications for joining the Union (R. 174). Thereafter, they were taken over to the Union Hall by an employee of the Company and received a dispatch slip from

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[2] The Board found "insufficient basis in the record for holding that the hiring of these 26 was delayed because of their lack of membership in the Union, rather than for the economic reasons testified to by the Company." (R 83)

Mr. Groothuis. All four of the individuals were then dispatched to various job sites of the Company.

The fifth student, William Wyman, arrived in Anchorage on the 13th day of June, 1956. Upon his arrival in Anchorage, he contacted the Company and talked to a Mr. King, who told him that he would be going out the following day, and that he would need a dispatch slip from the local union. Wyman then went to the Union hall and talked to Mr. Groothuis, who took his application for membership in the Union. Wyman was never told that he had to join the Union, and according to his testimony, he was aware of the fact that he did not have to join the Union as a condition of employment (R. 313); he further testified that neither Mr. Groothuis nor anyone else ever told him that he had to join the Union (R. 315), and that he "came to Alaska with the idea that [he] would join the Union" (R. 313).

With respect to the employment of local residents at the Big Mountain job site, the evidence established that, in fact, many local residents were hired as construction laborers when work for which they were qualified was available, that they were hired without reference to Union affiliation, that most of them did not belong to the Union at the time of hire and that some subsequently joined the Union voluntarily while others did not join at all. As above stated, the allegation with respect to the denial of employment to local residents at Big Mountain (which served as a basis for the whole proceeding) were held not to have been sustained and were dismissed.

At the conclusion of the General Counsel's presentation of its case at the hearing before the Trial Examiner, the Union moved to dismiss the consolidated complaint as to it and said motion was granted (R. 320). The Trial Examiner found that the Company violated Section 8(a)(3) of the Act by withholding job assignments from five employees until they had joined the Union and obtained job clearances from it and that by engaging in such "discrimi-

natory hiring practice'' the Company violated Section 8(a)(1) of the Act. The Trial Examiner recommended, however, that all other allegations of the complaint against the company be dismissed.

The General Counsel filed exceptions to the Examiner's Intermediate Report, contending that the evidence adduced at the hearing established that the Union was a party to a closed shop arrangement violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act. In this connection, the General Counsel pointed to the Company's practice, as found by the Examiner, of reserving employment out of its Anchorage office for persons who were members of the Union or able to secure its clearance and relied upon testimony to the effect that (1) the Company was ''allowed'' to specify the names of fifty percent of the employees to be dispatched by the Union; (2) the Company inquired as to whether particular job applicants were in good standing with the Union and accepted substitutes from the Union if such applicants were not in good standing; (3) on one occasion, a union job steward told a new employee that his first financial commitment was to pay his dues to the Union or he would be put off the job; and (4) on another occasion, the business representative of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union (R. 50, 51).

The Board found that the points relied upon by the General Counsel were sufficient to establish a *prima facie* case of violation by the Union of Sections 8(b)(1)(A) and 8(b)(2) of the Act through participation in an illegal closed shop and hiring hall arrangement and, accordingly, that the Examiner erred in dismissing the complaint as to the Union (R. 51). To afford the Union an opportunity to present its defense, the Board remanded the case to the Examiner for further proceedings *(ibid)*.

Pursuant to the Order of Remand, the Trial Examiner

advised the parties that the hearing would resume. In reply thereto, the Union informed the Examiner that "it rests and requests that the Supplemental Intermediate Report be based on evidence presently in the record" (R. 53). Shortly thereafter, the Trial Examiner issued his Supplemental Intermediate Report finding that the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act by "performing, maintaining, or otherwise giving effect to an understanding, arrangement, and practice with [the Company], whereby employees or applicants for employment who were not members of Local 341, as well as to those who were members, must obtain clearance or dispatch slips as a condition of employment . . ." (R. 62). The Trial Examiner recommended that the parties cease and desist from engaging in certain unfair labor practices, and take certain affirmative action to effectuate the policies of the Act, including the reimbursement of five named individuals of any and all fees and dues paid by them to the Union (R. 63-64).

Upon consideration of the Examiner's Intermediate Report, as modified by the Supplemental Intermediate Report and of the exceptions filed thereto, the Board found with respect to the Examiner's finding that "the Company and the Union participated in an arrangement that required applicants for jobs as laborers to obtain, as a condition of employment, dispatch slips from the Union which were issued only after application had been made for membership therein" that "the record amply supports this finding, at least with respect to hirings by the Company at Anchorage, Alaska, in connection with work done under the Company's cost plus contract with Western Electric Company." (R. 81-82).

The Board entered an order against the Company and Local 341 requiring, *inter alia,* that (1) they cease giving effect to "any understanding, arrangement or practice . . . whereby applicants for employment must become mem-

bers of, and obtain clearance or dispatch slips from Local 341 as a condition of employment . . .''; (2) ''they refund to all present and former employees of Morrison-Knudsen hired by it at Anchorage, Alaska, under its cost plus contract with Western Electric Company, Incorporated, all initiation fees and other moneys paid as a condition of membership in Local 341 . . .'' (R. 85-88).

SPECIFICATION OF ERRORS

1. The Board erred in finding that the Company violated Section 8(a)(3) by conditioning the employment of the five college students upon joining the Union and obtaining clearance from it.

2. The Board erred in finding that the Company and the Union were parties to an arrangement, understanding or agreement, which required applicants for employment as laborers at Anchorage, Alaska, to obtain as a condition of employment dispatch slips from the Union which were issued only to union members or only after application had been made for membership therein.

3. Assuming, *arguendo,* that the Company violated Section 8(a)(3), the Board erred in finding that the Union was responsible for the unilateral acts of the Company.

4. The Board erred as a matter of law in holding under the circumstances herein that the operation of a non-exclusive dispatching service by the Union violated the Act.

5. In issuing its order, the Board acted arbitrarily and capriciously and therefore abused its discretion in that:

(a) the invocation of the reimbursement ''remedy'' was unwarranted, inappropriate, punitive and utilized, not for remedial purposes, but to coerce employers and unions in the construction industry to adopt the Board's criteria for the operation of an exclusive dispatching system;

(b) the application of the desistance order to ''any other employer'' was a blanket ban completely unwarranted under the circumstances of this case;

(c) the application of the desistance order to "in any other manner" violating employees' Section 7 rights was unwarranted because it sweepingly enjoins the commission of acts neither similar nor related to those actions which the Board found were unlawful.

SUMMARY OF ARGUMENT

The legislative history of the Act and subsequent Court decisions make clear that Board orders must be supported by substantial evidence, viewed in the light of the record considered as a whole, and that Courts of Appeal are empowered to review the "reasonableness" and "fairness" of Board decisions. In arriving at its two basic findings, the Board relied upon selected shreds of testimony concerning an isolated atypical incident involving the temporary summer employment of college students, ignored testimony and evidence which plainly support contrary conclusions, and indulged in unwarranted inferences, surmises and conjectures. First, contrary to the Board's findings, the evidence does not establish that the employment of the five college students was conditioned by the Company upon their joining the Union and obtaining clearances from it. Second, the evidence in the record does not sustain the Board's finding that there existed an arrangement or agreement between the Company and the Union which contioned employment of laborers from Anchorage upon membership in and clearance by the Union. Indeed, the record is barren of even a suggestion that the Union caused or attempted to cause the Company to discriminate in any manner against anyone; the Company recruited through many sources, including the Union, and employed both union and non-union men side by side. Even if the conduct of Company officials with respect to the employment of the five college students may have constituted a technical violation of the Act, the Union cannot be held responsible for their unilateral action.

The operation of a non-exclusive dispatching service by the Union to supply experienced manpower when and if reqested by employers, does not violate the Act, particularly where, as here, the Company was free to, and actually did, hire outside of the Union, without restraint, and the Union did not discriminate in referring applicants to the employer.

The extraordinary "remedy" of reimbursement is not only unwarranted by the circumstances of this case but its imposition herein reflects the Board's total disregard of the unusual problems posed by the construcction of urgently needed, highly complicated national defense facilities erected in virtually inaccessible, uninhabited frontier areas of the United States. Under the circumstances of this case, reimbursement is a remedy which is inappropriate and punitive, constitutes an arbitrary abuse of the Board's discretion and contravenes the Fifth Amendment.

Moreover, the application of the Board's interdiction to "any other employer" constitutes a blanket ban which smacks too much of attainder to be acceptable to an Anglo-Saxon system of law. Further, the application of the desistance order to "in any other manner" violating employees Section seven rights is beyond the scope of the Board's authority because it enjoins the commission of acts neither similar nor related to those actions which the Board found were unlawful.

ARGUMENT

I. The Findings of the Board Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

The legislative history of the Act makes it plain that Board decisions must be supported by substantial evidence on the record as a whole and clarifies the power of Courts of Appeal to review "the reasonableness" and "fairness" of Labor Board decisions. The House Committee Report

(No. 245, H. R. 3020, 1 Leg. Hist. 332) complained that the Board was relying upon "imponderables", "findings, overwhelmingly opposed by the evidence," "findings that strain our credulity." As H. Conf. Rept. No. 510 on H. R. 3020, 80th Cong. 1st Sess. at pp. 55-56 stated:

> "(T)he courts . . . will be under a duty to see that the Board observes the provisions of the earlier sections [10(b) and 10(c)] and that it *does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reaso*n for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in . . . [the] *Republic Aviation* and *Le Tourneau*, etc. cases . . . without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10(e) of the amended act." (Emphasis supplied.)

Subsequently, the United States Supreme Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 stated at p. 488:

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

This is precisely the type of "fringe or borderline case, where the evidence affords but a tenuous foundation for the Board's findings", which requires this Court to "scrutinize the entire record with care", and "where there has been some contrariety of opinion between the Board and the Trial Examiner", as in the instant case, "the evidence

must be examined with greater care than when both the Board and the Trial Examiner are in complete agreement." *Joy Silk Mills, Inc.*, v. *NLRB,* 185 F. 2d 732, 742 (CADC), cert. denied 341 U.S. 914.

In making its two basic findings, petitioner contends, the Board relied upon scraps of testimony which appear to substantiate such findings, ignored testimony and evidence which plainly support contrary conclusions, indulged in unwarranted inferences and improperly regarded circumstances which might possibly raise a suspicion of illegal conduct as sufficiently substantial to support a finding. See *NLRB* v. *Citizen-News Co.,* 134 F. 2d 970, CA 9.

A. First, the Board adopted the finding in the Trial Examiner's Intermediate Report that "the Company violated Section 8(a)(3) and (1) of the Act by conditioning the employment of Abolins, Crowe, Garnes, Bleeck and Wyman upon their joining the Union and obtaining clearance from it'' (R. 81).

The Trial Examiner based this finding primarily, if not solely, upon the testimony of Abolins, Crowe and Garnes concerning their initial job interview with a Company official, the essence of which was, according to the Trial Examiner, that Haugen, the Company official "stated, in effect . . . that they would have to join Local 341 in order to obtain a laborer's job with M-K". Despite their concurrent participation in the meeting with Haugen, their recollection as to what actually was said is at such variance as to afford little, if any, basis for a finding.[3] Only Garnes

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[3] Mr. Abolins (R. 172):

''We went into the office. We saw a gentleman there, I don't know who it was now, but he told us that they had been expecting us. We had identified ourselves to him and he said that we would have to go through the Union Hall and then they would dispatch us to the job site."

Mr. Crowe (R. 203):

''The man we talked to, he said he had expected us, that we

was "quite sure" that "Haugen said we had to join the Union before we could go to work'' (R. 219). Crowe could not recall ''what he said exactly'' nor could he recall anyone telling them that they had to join the Union (R. 210-211). Nor could Abolins remember Haugen's exact words, his recollection being limited to an alleged "intimation'' that Haugen intended to convey (R. 188). Bleeck, the fourth student, did not testify and Wyman, the fifth student, whose testimony with respect to joining the Union both the Trial Examiner and the Board chose to ignore despite the fact that he was a witness called by and on behalf of the General Counsel, testified as follows (R. 313-314):

Q. Can you state whether in fact you asked him [Company official] about whether you could join the Union or whether he asked you, told you to join the Union, do you recall that?

A. Certainly, Nobody told me to join the Union. At no such time did I ever feel that there was anybody telling me to join the Union . . . I know that Alaska is in effect not a closed shop and that I didn't have to join the Union.

Q. You knew you did not have to?

A. Certainly, I was aware of that.

* * *

Q. But you joined the Union of your own volition?

A. I can honestly state that nobody told me to join the Union.

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had jobs, that there were a couple of steps to go through and we would be sent out immediately. First, we would have to see the Union, then to M-K employment office for dispatch."

* * *

''I don't know what he said exactly. He said one of the first steps would be to go through the Union and then through dispatch."

Mr. Garnes: (R. 213):

''He talked to us a little bit about school and everything, and then he said that we would have to join the Union before we could work, and he would call Mr. Groothuis to come over."

Thus, of the five college students whose employment was found to have been conditioned "upon their joining the Union and obtaining clearance from it", one student did not testify, one student was positive that "nobody told me to join the Union," one student was only "quite sure" that he was told he had to join the Union, one student subjectively evaluated his conversation with a Company official as intending to convey an "intimation" that he had to join the Union and the remaining student had no recollection of anyone telling him that he had to join.[4] There is no evidence in the record, even to suggest that the basis upon which the Company afforded employment to Wyman differed from that of the other students. Clearly, then, we submit, in the absence of any evidence establishing that Wyman's employment was conditioned upon joining the Union, the different versions of their initial job interviews, as presented by Abolins, Crowe and Garnes, cannot possibly be regarded as such "substantial evidence" as to afford a basis for the conclusion that they were told directly or indirectly that they had to join Local 341 in order to obtain a laborer's job.

Moreover, that these students did not, in fact, have to join the Union to obtain a job is made eminently clear from the record. First, there is absolutely nothing in the record which establishes or even suggests that refusal to join the Union precluded employment. Indeed, the record plainly shows that many non-union persons were employed by the Company. Second, the record also clearly establishes that these students, in fact, were employed by the Company as laborers even before they arrived in Alaska or before they spoke to the Union's representative, that they knew they had jobs before leaving for Alaska and

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[4] It is highly significant that there is not even a scintilla of evidence in the record that the Union's representative Groothuis told any of the students that they had to join the Union.

that there never was any question in their mind as to having such jobs. (R. 199, 203, 210, 218-219, 314.)

Employment of the five college students was no more conditioned upon their obtaining clearance from the Union than upon their joining. Plain common sense dictates that there can be no possible reason for requiring five college students to be "cleared" by the Union for employment when they had been hired prior to their arrival in Alaska and the Company employs many non-union persons who are employed without union "clearance." Apparently both the Trial Examiner and the Board failed to comprehend the function and significance of "dispatch slips" given to some new employees by the Union. The inference drawn by the Trial Examiner and the Board that the issuance of such dispatch slips is tantamount to "clearance" by the Union is not predicated upon any evidence whatsoever that union clearance was an essential precondition of employment. It simply does not follow that union issuance of dispatch slips proves that the Union "cleared" prospective employees.

The only evidence in the record pertaining to the purpose and role of "dispatch slips" unmistakably establishes that their issuance had no significance with respect to being or not being hired; issuance was simply a ministerial task undertaken by the Union as a technique for enabling the Union, as the collective bargaining representative of the employees, to know the names of persons being hired and where they are being assigned to work by the Company,[5]

[5] Under the terms of the collective bargaining agreement the Company was required to notify the Union of the names of the persons whom it hired. In the absence of a dispatch slip system, the Company would have had the burden of notifying the Union, presumably even with respect to those referred by the Union in response to the Company's request. Whether the Company notified the Union directly or told the employee to go to the Union and give notification and receive a dispatch slip as evidence of such notification is of no import, we submit, to a determination

and as a device, generally, for the Company to know that a person reporting to a job is the man who the Union has referred to the Company in answer to the Company's request. Such evidence has been completely ignored by the Trial Examiner and the Board.

The evidence in question establishes that a considerable portion of the labor hired by the Company in Alaska is hired through the Union because the Union renders a real and valuable service in keeping track of the location of qualified construction laborers, in being familiar with employee's skills and employers' needs and in being able most effectively to supply necessary applicants. In short, the Union is in the best position to supply qualified manpower expeditiously and, particularly so, in locations such as the rural areas of Alaska where skilled and semi-skilled manpower for large construction projects is extremely limited and dispersed (R. 335-6, 329-330, 335).

In order to avoid mistakes and duplications, the Union, in filling a Company's request for applicants, issues to the persons referred to a Company so-called "dispatch slips" which are delivered to a Company by the applicant reporting for interview as evidence that the reporting applicant is the man whom the Union has referred in compliance with the Company's request. Because a large part of laborers hired had presented themselvs with a dispatch slip from the Union, Company personnel in Anchorage handling employment were apparently under the impression that they should require a dispatch slip. But there is no evidence whatsoever that they were ever advised that a dispatch slip was necessary (R. 148), nor is there any evidence that employment was refused to anyone who did not

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of whether employment was conditioned upon union membership or clearance, particularly where the record is utterly devoid of evidence that the Union conditioned issuance of a dispatch slip upon union membership or that the Union ever refused to issue a dispatch slip to any employee requesting one.

have a dispatch slip. On the other hand, there is substantial evidence that many persons were employed who did not have such a slip (R. 351-2, 360).

Accordingly, when Mr. Haugen called the Business Representative of the Union on June 11, 1956, and told him that "the boys were in my office and would be dispatched to the job, either that day or the following day", the call was plainly made in connection with obtaining the dispatch slips for the students. But neither this telephone call nor the fact that the Business Representative thereupon came to the company's office to request the students to make application for Union membership ''buttresses'', as the Trial Examiner stated, the finding that "Haugen stated, in effect, . . . that they would have to join Local 341 in order to obtain a laborer's job." A union representative is not precluded from soliciting members and the fact that he becomes aware of potential members as result of a telephone call from an employee of a Company in connection with a matter unrelated to union membership neither establishes the fact that the Company unlawfully encouraged membership nor that employment was conditioned upon membership. The record is clear that employment, in fact, preceded the meeting between the students and Business Rpresentative of Local 341, that the students made application for union membership without protest, that they had no objection to such act, that they did not inquire as to whether they had to join the Union or not, that they were not required to pay either initiation fees or dues at the time of making application and that they were immediately dispatched to job sites without becoming full-fledged union members by paying their fees and dues (R. 195, 207-8, 217).

B. Second, the Board also adopted the finding in the Trial Examiners' Supplemental Intermediate Report that "the Company and the Union participated in an arrangement that required applicants for jobs as laborers to obtain, as a condition of employment, dispatch slips from the

Union, which were issued only after application had been made for membership therein'' (R. 81-2). Significantly, the Board somewhat hedged its adoption of this finding by stating that the record supports this finding "at least with respect to hirings by the Company at Anchorage, Alaska, in connection with work done under the Company's cost plus contract with Western Electric Company'' (R. 82). This limitation, of course, was necessitated by the total absence in the record of any evidence, other than that concerning the circumstances of the employment of the five college students who performed work under the Western Electric contract, upon which such a finding could be based. But it is strange indeed, we submit, that the Company would have a hiring "arrangement" for part of its operations (Western Electric sub-contract) and no such "arrangement" for the remainder of its work, and that if it did, in fact, have such an "arrangement" for all of its construction activities, no evidence of such was available for presentation by the General Counsel.

This finding is obviously one which the Trial Examiner did not initially feel impelled to make on the basis of the record. As hereinbefore pointed out, at the conclusion of the General Counsel's presentation of his case, the Union's motion to dismiss the complaint as to it was granted, an action taken by the Trial Examiner presumably pursuant to his judgment that the record as a whole did not establish the existence of an illegal "arrangement" in which the Union participated. But, the Board, in effect, sustained the Exceptions of the General Counsel to the Intermediate Report [6], reversed the Trial Examiner and issued an Order

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[6] In his exceptions, the General Counsel urged that the evidence established that the Union was a party to a closed shop arrangement and pointed to the testimony to the effect that (1) the Company was ''allowed" to specify the names of fifty per cent of the employees to be dispatched by the Union; (2) the company inquired as to whether particular job applicants were in good

of Remand, as a consequence of which the Trial Examiner, being bound by the Board's finding of a *prima facie* case, was compelled to reverse his earlier decision. To sustain this latter decision the Trial Examiner found it necessary for the first time to rely upon the testimony of Raoul Wargny as the basis for his finding that an illegal "arrangement" existed.

Apparently, the testimony of Wargny was not accorded any credence by the Trial Examiner prior to the issuance of his Intermediate Report[7] and the subsequent credit given to that testimony by both the Trial Examiner and the Board simply is not justified by the record. Wargny was the personnel man for the job here involved. He testified that it was up to him to obtain men for the site superintendents upon their requests (R. 158), and that he only had two sources, the Company's files and the Union. From the record, it is obvious that Wargny was new to this job and that he did not know the job classifications or the skills involved (R. 150), and that he therefore had to depend in large measure upon the Union to assist him in performing his job. He was subsequently involuntarily terminated by the Company (R. 328), and was, it is reasonable to assume, unfriendly toward his former employer.

Wargny testified that "good standing" meant good standing with the Company, and that "eligible for re-hire" related to whether or not the employee had an "eligible for re-hire" slip in his folder, which was maintained in the

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standing with the Union and accepted substitutes from the Union if such applicants were not in good standing; (3) on one occasion, a Union job steward told a new employee that his first financial commitment was to pay his dues or he would be put off the job, and (4) on another occasion, the business agent of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union (R. 50-51).

[7] Under the *Universal Camera* decision, *supra*, it is the function of the Trial Examiner to evaluate the credibility of witnesses.

personnel department of the Company (R. 146). Yet, it is obvious that the Trial Examiner in his Supplemental Intermediate Report attached a different meaning to Wargny's testimony (he apparently took contradictory testimony by Wargny, found elsewhere in the record (R. 134)) and found that "eligible to be dispatched for hiring" meant eligible insofar as Local 341 was concerned. Wargny also testified that, although he told members of the Union that they would have to go to the Union to get dispatched, no one had ever told him that that was the Company's policy (R. 147-8). When asked whether he knew what was required to secure a dispatch slip, Wargny answered "No", but he assumed that "you have to join the Union first before you can get a dispatch slip" (R. 155).

In addition to indulging himself in assumption, Wargny was contradictory in his testimony. On cross-examination, Mr. Wargny was asked whether he ever told the college men involved that they had to join the Union. His answer was an unequivocal, "No, sir." (R. 153). Yet, on pages 152-155 of the Record, he contradicts himself. First, he says that he didn't tell them that they had to join the Union (R. 153); then that they would have to join the Union (R. 154); and, finally he states that when they came into the office he told them to go down to the Union to get their dispatch slips, that they would have to join the Union (R. 154).

And, finally, Wargny specifically admitted that he never received instructions from his superiors to require dispatch slips, nor demands that such slips be obtained from Union representatives (R. 147-8); that although he could remember an instance when the Union had refused to send a man, he could neither remember the person's name nor whether he had been subsequently hired by the Company (R. 160); that he had not been told that he could not hire nonunion persons (R. 161); that, in fact, he could hire nonunion workers (R. 161); and that while he was Personnel Manager for the Company he was neither told, nor was

aware, of any agreement between the Company and Union to the effect that only Union members would be hired and that the Company would use the Union as its sole source of recruitment of labor (R. 169).

We submit that the testimony of Wargny affords little, if any, basis for a finding that there existed "an agreement, understanding and practice that required laborers who were not members of Local 341 . . . to obtain dispatch slips . . . as a condition of employment."[8] Such a finding completely ignores the credible testimony of Mr. Einar Erickson (R. 326, 328-9) which is in direct conflict with that of Wargny's as well as the testimony of various employees, namely, Rickteroff, Olympic, Endrus, Wassaille, Enolon and Drew to the effect that they had obtained jobs without clearance through the Union and, in some instances, had never joined the Union even though they performed work under the Union's jurisdiction. Whatever slight inferences Wargny's testimony, if credible, might possibly raise, they are negated by the record as a whole, particularly in view of the absence in the record of any evidence of actual discrimination or refusal to dispatch or of any evidence either in the form of a contract or otherwise that the Union had demanded and the Company had acceded to such arrangement as found by the Board. We submit that Wargny's testimony does no more than reflect his personal assumptions concerning, and misunderstanding of, the dispatch functions.

The significance of Wargny's testimony is underscored by the Board's reliance thereon in its Order of Remand which specified four items of testimony which it held established a *prima facie* case of an illegal agreement between the Company and the Union.

(1) Item No. 1 was Wargny's unsupported testimony

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[8] "This evidence is not the kind that responsible persons are accustomed to rely on in serious cases." *NLRB* v. *Englander,* 260 F. 2d 67, 72 (CA9).

that the Company was "allowed" to ask for fifty per cent of its employees by name. On the other hand, Sean Brady, another Company personnel man, testified that there was neither an arrangement with the Union as to a limitation on named requests nor that there was anything ever written in this connection nor was he ever instructed by the Company that it could request only a certain percentage of named people. (R. 227).[9] In addition, Wargny's superior, Einar Erickson, testified that there was no such understanding (R. 329, 351). Assuming, *arguendo,* the existence of such an understanding, it neither violates the law nor constitutes proof of the existence of an illegal hiring arrangement requiring membership in the Union as a condition of dispatch.

(2) Item No. 2 involves Wargny's testimony that the Company inquired as to whether particular job applicants were in good standing with the Union and accepted substitutes from the Union if such applicants were not in good standing. This evidence has apparently been misconstrued by the Trial Examiner and the Board as indicative of a discriminatory practice despite Wargny's own testimony that "good standing" meant "a man that hadn't been discharged from his job before, or he had an eligible for rehire slip, eligible rehire in his folder, which we maintain in the personnel department in Anchorage." (R. 146). In any event, in view of Wargny's failure to recall any specific instance other than the one alleged instance in which the Union did not "want" to dispatch an unidentified person (R. 160), we submit that it is unreasonable to predicate a finding that a discriminatory practice existed upon such insubstantial evidence.

(3) Item No. 3 relates to "one occasion" on which "a Union job steward told a new employee that his first fi-

[9] Brady testified that the Company had a self-imposed limitation on specific requests because it felt it was not "fair to continually ask for every man by name" (R. 228).

nancial commitment was to pay his dues to the Union or he would be put off the job." That such a statement affords little basis for a finding that there was a closed shop hiring hall arrangement is palpably evident. It constitutes, at best, nothing more than a gratuitous over-statement on the part of a job steward in a zealous attempt to solicit union members. The record is barren of any proof of the job steward's duties or authority, if any, with respect to removing workers for non-payment of dues and there is nothing in the record to establish a Company policy or agreement to fire a worker because he was not a union member. Indeed, there is no evidence that the job steward was ever told that the Company would fire an employee for refusing to be a union member and no evidence that any man was ever fired by the Company because of lack of Union membership. In the absence of such evidence in the record and in the presence of clear evidence that non-union persons were employed without ever becoming union members, an overzealous, unauthorized statement by a job steward on a remote construction site is hardly binding on the Union or probative of the fact that there was a tacit agreement, understanding or practice to the effect that union membership was a condition of employment with regard to hiring from Anchorage.

(4) Item No. 4 relates to "another occasion" on which the business representative of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union" (R. 51). This alleged evidence of a "practice" was ripped out of the fabric of the testimony of college student Wyman and has been accorded a meaning and significance wholly inconsistent with the tenor of Wyman's testimony. In substance, Wyman's testimony was that nobody ever told him that he had to join the Union, that at no time did he ever feel there was anybody telling him to join the Union, that he came to Alaska with the idea that he would join the Union because he intended to work during the summer,

that he knew that in Alaska there was no closed shop in effect, and that he did not have join the Union (R. 313). Mr. Wyman also specifically stated that Mr. Groothuis, on June 13, 1956, did not tell him that he had to join the Union (R. 315). When Wyman's testimony is viewed as a whole, then it is perfectly understandable that in a conversation between an employee and a Union business agent, where there has been conversation between them to the effect that the applicant is going to join the Union, the most natural thing in the world in response to a "When do I get a dispatch slip" is "Let's fill out the application first," or "After you fill out the application." It is unfair to draw an inference from the remark of Groothuis that there would be no dispatch slip in the absence of an application because the atmosphere is absolutely different than it would have been if Groothuis had been coercing or intimidating Wyman into joining the Union.

Accordingly, that Wargny's testimony does not afford a sound basis for the Board's finding is manifestly clear. As hereinbefore pointed out, the only testimony which conceivably could support such finding was that concerning the circumstances of the employment of the college students. We believe that such circumstances were, to say the least, unusual and cannot be regarded as indicative of a general practice. It must be remembered that these students were not residents of Alaska and that they were temporary unskilled employees hired in the State of Washington for a particular season. Obviously, they were not typical construction laborers. The construction season in Alaska is of short duration. Local residents who are regular construction workers must rely upon employment during this period as the principal means of sustaining themselves and their families over the year. In the face of the unemployment of local construction workers, Company officials may have felt that the employment of inexperienced non-residents would cause on-the-job difficulties which would be exacerbated by failure to join the Union. Hence, Haugen's telephone

call to Groothuis. But, to infer from this atypical isolated incident that a general practice prevailed requiring employees to join the Union before commencing employment is both illogical and unwarranted.

To conclude, as the Board did, that the record herein supports the findings which the Board adopted makes a mockery of the "substantial evidence" requirement of the Act. The whole record establishes, we submit, that the Union was only one of the Company's sources of labor, that the Company employed non-union persons, that laborers were employed without the necessity of obtaining Union clearance or dispatch slips, that no employees were fired for failing to join the Union, that there was no Union refusal to dispatch a non-union person and that there was no requirement that workers had to join the Union to secure a job. The Board's dismissal of the original charges which triggered the complaint substantiates this view. At best, the evidence relative to the employment of the college students reflects an atypical situation not indicative of a general policy of the Company nor does it constitute any proof of an illegal arrangement with the Union. Such evidence plainly does not afford a "substantial basis of fact from which the fact in issue can be reasonably inferred." *NLRB v. Columbian Enameling and Stamping Co.*, 306 US 292, 299.

II. It Is Not an Unfair Labor Practice for a Company to Obtain Part of Its Personnel Through a Dispatching Service Maintained by a Union.

Despite the absence in the record of any evidence establishing that the Union unlawfully discriminated against non-union members in supplying the Company with personnel or that the Company was required to, or actually did, hire all of its employees through the Union or that employees were required to join the Union in order to secure jobs, the Board nevertheless concluded that the Union violated the Act by participating in a closed shop arrange-

ment which required membership in and clearance by the Union as a condition of employment from Anchorage.

Section 8(b) (2) makes it an unfair labor practice for a labor organization or its agents to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)."

The crux of the prohibition therefore is encouragement or discouragement of union membership by discrimination in employment. As the Supreme Court has explained (*Radio Officers' Union* v. *NLRB,* 347 US 17, 42-43):

> "The language of Sect. 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations, only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

Turning to this case, the operation of a dispatching service by the Union with respect to some of the personnel employed by the Company would not be violative of the Act, in view of the Company's freedom to hire outside of the Union, because it entailed no discrimination in employment. Indeed, even if the record would establish, as it does not, that the Union dispatched only union members, the non-exclusive nature of the hiring arrangement between the Company and the Union would preclude a finding that such arrangement was violative of the Act. See, *Webb Construction Co.* v. *NLRB,* 196 F 2d. 841 (CA 8).

The collective bargaining agreement between the Company and the Union left the latter free to hire employees through the Union or otherwise and the record plainly shows that the Company utilized various sources to meet its manpower needs. The record also shows that not only was there no requirement that persons had to join the Union to secure jobs but that non-union persons were

actually employed. In short, the agreement between the parties was an "open shop" agreement (as the General Counsel conceded, (R.138)) and the construction projects on which employment occurred were "open shop" jobs. The Board, however, only considered one source of labor supply —the union—and inferred the existence of an illegal closed shop and hiring hall arrangement in complete disregard of the evidence in the record establishing the Company's right and practice of (1) hiring transfers from other jobs, (2) hiring directly, either natives or specific individuals including college students, (3) calling the Union to locate specific persons or for qualified applicants.[10] To meet the manpower needs of the industry on short notice the union maintains a dispatching service. This service is an economic instrument valuable to the employers and employees in regularizing employment, particularly in a case such as the instant one in which employment is at remote sites and the Union is in a better position than the Company to secure qualified manpower. For reasons of safety, specific job problems, intermittent construction, fluidity of operations and inability of employers to maintain a processing system of recruitment (as shown here), an employer tends to rely on a hiring hall to obtain a majority of his skilled men quickly.

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[10] The complaint in this case charged, in substance, that pursuant to a preferential closed-shop arrangement certain non-union natives had been discriminatorily denied employment on a particular job because they were not members of the Union. This charge was dismissed after evidence established that natives were employed and that they were not required to join the Union to obtain or maintain employment. Logically, this evidence should also have established the open-shop nature of the job. But the Board sidestepped this logical conclusion by finding the existence of a closed shop condition, *in part*. Thus, we have the Board arriving at an Alice-in-Wonderland conclusion that a job part union and part non-union is not an open shop but, rather, a closed shop job so long as the part that is non-union is ignored.

The foregoing analysis of the statutory terms and the validity of the non-exclusive dispatching service in this case are confirmed by the decisions of this and other Courts of Appeals. In essence these decisions have held that even where an *exclusive* dispatching service is maintained it is lawful so long as referral is made upon a nondiscriminatory basis, an employee being neither denied referral nor granted preference based on union membership or the performance of the obligations of union membership. A "referral system is not *per se* invalid" and its operation becomes invalid only "if the union applies it discriminatorily." *NLRB* v. *Philadelphia Iron Workers, Inc.*, 211 F. 2d 937, 943 (CA 3). See also *Eichleay Corp.* v. *NLRB*, 206 F. 2d 799, 803 (CA 3). "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Co.* v. *NLRB*, 196 F. 2d 841, 845 (CA 8). "The action of an employer in hiring workmen through a union by means of referrals from the union, is held not to violate the Act, absent evidence that the union unlawfully discriminated in supplying the company with personnel." *NLRB* v. *F. H. McGraw and Co.*, 206 F. 2d 635, 641 (CA 6).

The position was elaborated by this Court in *NLRB* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 514, cert. denied, 346 U.S. 814 as follows:

> "An employer violates Sec. 8(a)(3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment. *NLRB* v. *Cantrall*, 9 Cir., 1953, 201 F. 2d 853. The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a "guarantee that the union does not discriminate against nonmembers in the issuance of referrals." We do not believe *National Union of Marine Cooks and Stewards*, 90 NLRB 1099 (1950) supports this view. Although it was there noted that the provisions of an applicable labor contract prohibited such discrimination, the

Board did not indicate that a referral system was *per se* improper absent a "guarantee" of non-discrimination. Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deem proper was recognized by the Board in *Hunkin-Conkey Const. Co.*, 95 NLRB 433 (1951), where it was said an agreement that hiring of employees be done only through a particular union's office does not violate the Act "absent evidence that the union unlawfully discriminated in supplying the company with personnel." 95 NLRB at 435.

As the Court of Appeals for the First Circuit explained just recently (*NLRB* v. *International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350):

> "It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system, the employer calls upon the union to supply him with the necessary workers. However, if this system operates so as to discriminate against non-union workers and makes possible only the employment of union members, it is an unfair labor practice."

And the views which the First, Third, Sixth, Eighth and Ninth Circuits united in expressing were stated in 1950 by Senator Taft, the principal architect of the 1947 amendments of the Act (S. Rep. No. 1827, 81st Congr., 2d Sess., 14):

> "The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. * * * Neither the law nor these decisions forbid hiring halls, even hiring halls operated by unions, *as long as they are not so*

operated as to create a closed shop. * * *" (emphasis supplied)

That this case does not present a closed shop situation is eminently clear. And such a situation may not properly be inferred from the unilateral conduct of the Company. Assuming, *arguendo,* that the Company did require as a condition of employment that employees clear through Local 341, there is no evidence to connect the Local or its Business Representative with the Company's unlawful conduct. Indeed, witnesses Wargny and Erickson denied the existence of any hiring arrangement between the Company and Union (R. 169, 329). The statements allegedly made by Haugen, a Company official, to the four college students were neither binding upon the Union nor proof of any such arrangement. And the conduct of the Business Representative Groothuis in soliciting membership plainly does not establish an agreement to confine employment to members of the Union, particularly in the absence of evidence that clearance was denied to non-members and the presence of evidence that non-members actually were employed without Union clearance. "The burden of proof placed upon the General Counsel was not satisfied by a mere showing that the existence of such an agreement was consistent with the Company's unilateral conduct." *NLRB* v. *Thomas Rigging Co.,* (CA 9) 211 F. 2d 153, 157, cert. den. 348 U.S. 871. See also, *NLRB* v. *Brotherhood of Painters,* (CA 10) 242 F. 2d 477. If, indeed, the Company adopted a discriminatory hiring policy, "many reasons may have motivated [it] . . . and it is not improbable that it voluntarily chose to do so on a unilateral basis" (*Thomas Rigging Co.* case, *supra*).

We reach the question whether, apart from Section 8(b)(2), there was a violation of Section 8(b)(1)(A). The Board's finding of a violation of the latter provisions is derived solely from its finding of a violation of the former and has no independent significance. The two fall together.

III. "The Board Abused Its Discretionary Power by Issuing an Order Requiring (1) The Company and Union Jointly and Severally to Reimburse All Employees for the Dues and Initiation Fees Paid to the Union by the Employees, (2) Union Desistance from Certain Conduct as to "Any Other Employer," and (3) Union Desistance from Restraining or Coercing "In Any Other Manner" Employees in the Exercise of Their Section 7 Rights."

The Board's Order requires the Company and Local 341 jointly and severally to "refund to all its present and former employees hired at Anchorage, Alaska, for work under its cost plus contract with Western Electric Company, Incorporated, all initiation fees, dues, and other moneys paid as a condition of membership in Local 341" for the period beginning six months before the filing of the unfair labor charge. In explanation of this requirement the Board stated that (R. 83-84):

> "By the aforesaid unlawful hiring arrangement, the Respondents have unlawfully coerced employees to join the Union in order to obtain employment, thereby inevitably coercing them into the payment of initiation fees, Union dues, and other sums. In order adequately to remedy the unfair labor practices found, the Respondents should be required to reimburse employees of the Company for any initiation fees or dues, and other moneys, which have been unlawfully exacted from them as the price of their employment. Therefore, as part of the remedy we shall order the Respondents, jointly and severally, to refund to the employees of the Company hired at Anchorage, Alaska, for work under the Western Electric contract mentioned above, all initiation fees, dues, and other moneys paid by them to the Union as the price of their employment. We believe that these remedial provisions are appropriate and necessary in order to expunge the coercive effect of the Respondent's unfair labor practices."

An order cannot stand if it is "not appropriate or adapted to the situation calling for redress and constitutes

an abuse of the Board's discretionary power.'' *NLRB* v. *District 50, United Mine Workers,* 355 U.S. 453, 463. While broad, the Board's ''power is not limitless; it is contained by the requirement that the remedy shall be 'appropriate', *Labor Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, and shall 'be adapted to the situation which calls for redress.' *Labor Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 348. The Board may not apply 'a remedy it has worked out on the basis of its experience, without regard to the circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.' *Labor Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 349.'' Id. at 458.

As we now show, the reimbursement order in this case is not adapted to the wrong found but is a patent attempt to ''prescribe penalties or fines'' for its commission. *Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 10. Moreover, as applied to the circumstances of this case, reimbursement is a remedy which is ''oppressive and therefore not calculated to effectuate a policy of the Act.''

1. The Board has invoked the extraordinary remedy of reimbursement without regard to the unusual circumstances surrounding the construction projects on which the alleged unlawful conduct occurred. National defense construction projects in remote areas of Alaska and elsewhere where the supply of qualified manpower is limited necessarily involves more than the usual coordination and cooperation between employers and unions if the job is to be performed expeditiously at a reasonable cost. Unless Union facilities are made available to employers in such situations to assist them in securing skilled manpower, it is not unreasonable to believe that the defense program will be seriously hampered. Union referral under such circumstances as are here present, particularly where there is no proscription of employment of non-union members, neither adversely affects commerce nor is inimical to the

general welfare. To scotch cooperation between employers and unions where circumstances make it essential by the mechanistic application of a "remedy" which might serve the purposes of the Act under different circumstances is, we submit, oppressive, unwarranted, and an abuse of power.

Not only has the Board applied a "remedy" without regard for the circumstances under which the alleged wrong occurred but its conclusion that a wrong occurred was reached by a process of reasoning from an inference "piled upon an inference, and then another inference upon that . . ." *Interlake Iron Corp.* v. *NLRB,* 131 F. 2d 129, 133 (CA 7). From the Board's inference that an arrangement existed whereby employment was conditioned upon joining the Union, it then infers that employees therefore joined the Union to safeguard their opportunities for employment. Since, the Board argues, joining the Union was induced by fear of discrimination, payment of union dues and fees as an adjunct of union membership was the product of that illegal inducement, and, accordingly, such dues and fees should therefore be refunded.

The Board indulges itself these inferences despite the absence of any evidence in the record to support them. For example, there is nothing in the record to establish when the "arrangement" commenced. Were all of the Company's employees hired after the institution of the "arrangement"? The Board must assume that they were. For if the employees joined the union *before* the operation of the dispatching service began, there is no basis for the Board's assumption that employees joined in order to protect their employment from discriminatory operation of the dispatching service. Membership which *preceded* the dispatching service could not have been caused by it. The Board assumes this critical fact—that membership followed rather than preceded the dispatching service—without an iota of evidence to support the assumption.

But the fundamental vice in the Board's position lies deeper still. For the Board assumes, in disregard of the whole history of the growth of the labor movement, that the employees had no important incentive to join Local 341 except to escape its presumed discrimination against them. Most of us have supposed that the reason for union membership is somewhat different. In 1921 the Supreme Court stated what was already then a commonplace (*American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209):

> "[Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth."

In fostering union organization and collective bargaining, the Act is based on the premise that these are needed to redress the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . ." (Sec. 1, para. 2) Through union membership and collective bargaining employees seek the benefits of employment standards "which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case* v. *NLRB,* 321 U.S. 332, 338. There is no evidence in the record to support an assumption that in this case the union membership of the employees was not part of this main stream. There is substantial evidence to the contrary.

As with any other order, so with a refund order, it must be shown to justify it that the order eradicates "a *consequence* of the unfair labor practices found by the Board . . ." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 236. Damages are not recoverable unless they are "the certain result of the wrong," "definitely attributable to the wrong . . ." *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 562. And, in this case, it simply does not stand established that union membership and the payment of dues and fees, was the consequence of discriminatory operation of the dispatching service. It "is left to mere conjecture to what extent membership . . . was induced by any illegal conduct . . ." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 238. Local 341 "was entitled to form" its organization. It was entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. The Board's assumption that the Company's employees paid union dues and initiation fees to Local 341 involuntarily also completely ignores the fact that Local 341 was the unchallenged majority representative of such employees and enjoyed such status despite the absence of a check-off and union security provision in the agreement. Experience has demonstrated overwhelmingly that employees who choose to be represented by a union in collective bargaining also choose to pay union dues and fees to it.[11] Employees voluntarily pay fees and dues because they know

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[11] When the 1947 amendments to the Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement could only be valid "if, following the most recent election held as provided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to

they cannot have the benefits of union representation without contributing to its cost. The negotiation of an agreement costs money, as does its administration. Dues and fees go towards defraying the cost. They do not repose in depositories. It may safely be assumed that much of the fees and dues collected in this case have been expended to pay for service. To require the reimbursement of dues and fees at this late date does not simply mean that the employees will have received the benefits of union representation without contributing to their cost. The moneys for

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make such an agreement. . . .'' This requirement was repealed on October 22, 1951 (Public Law 189, 82d Cong. 1st Sess.), it having proved ''burdensome and unnecessary.'' *NLRB* v. *Gaynor News Co.*, 197 F. 2d 719, 724 (C.A. 2), affirmed 347 U.S. 17. Its pointlessness was manifest from the results of the union shop authorization polls conducted by the Board. Thus, for the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2% of the employees, voted in favor of the union shop. (NLRB, Sixteenth Annual Report, p. 306 (1951).) The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the union shop (NLRB, Fifteenth Annual Report, p. 235 (1950)); in 1949, of 1,471,092 valid votes, 93.9% favored the union shop (NLRB, Fourteenth Annual Report, p. 172 (1949)); in 1948, of 1,629,330 valid votes, 94.2% favored the union shop (NLRB, Thirteenth Annual Report, p. 111 (1948)).

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements forever puts the quietus to the notion that employees pay dues and fees unwillingly. These agreements operate compulsively only as to that small group known as ''free riders, i.e. employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union . . .'' *Radio Officers' Union* v. *NLRB,* 347 US 17, 41. Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation to pay.

reimbursement must come from somewhere, and insofar as Local 341 is concerned, they must come from the dues and fees paid by those members of the Union not employed by the Company, some of whom may not have been employed by the Company because of its hiring of local residents, college students and non-union members. Such a consequence highlights the inappropriateness of the Board's order.

Furthermore, aside from the negotiation and administration of an agreement, unions undertake to provide for their members many valuable benefits which are intra-union in character. Death or disability plans, mutual insurance and vacation benefits are among these. To drain the union's treasury by requiring the refund of dues and fees may seriously jeopardize its ability to meet existing commitments and prudently to undertake additional benefit programs. Indeed, under this Union's Constitution, compulsory reimbursement will automatically cause the employees affected thereby to lose their "good standing" in the Union with a consequent loss of rights to such benefits, the right to hold or run for union office, and other valuable rights which are conditioned upon continuous good standing in the Union. We submit that where there is an unchallenged majority representation not as consesequence of an illegal agreement or arrangement, then there is a presumption of non-coercion attaching, so that the deprivation of valuable property rights through the application of a compulsory reimbursement doctrine, without a hearing to determine whether a particular employee has been coerced, constitutes the deprivation of property without due process of law within the Fifth Amendment to the Constitution of the United States.

The application of the reimbursement remedy in this case will not only deprive employees of valuable property rights attendant upon union membership. It also deprives employees of their statutory right to join and assist a

union of their own choosing. Since this is not a case of a company-dominated union which is deemed inherently incapable of fairly representing its members, the denial of the right to join as a consequence of the Board's Order represents punitive rather than remedial action, and, accordingly, constitutes an abuse of the Board's discretionary power. As the United States Supreme Court has pointed out, the Board's "power to command affirmative action is remedial, not punitive." (*Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 236) "The Act does not prescribe penalties or fines." *Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 10), nor is the "deterring effect" of any order "sufficient to sustain" it, for the Board would then "be free to set up any system of penalties which it would deem adequate to that end." (id. at 12)

The current use of the refund order is in deliberate disregard of the Board's limited remedial authority.[12] The attribute of the order which lends it to punitive application, apart from the aspects above noted, is the staggering financial liability it entails.[13] This potential liability makes it virtually impossible for a union and an employer to resist yielding to the Board's conception of a valid referral system of employment, a conception set forth in its

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[12] In its present posture the refund order has come to be known as the Brown-Olds remedy, the name being derived from the case in which the current version of the refund order was devised. *Brown-Olds Plumbing and Heating Corp.,* 115 NLRB 594.

[13] A contested proceeding before the Board, from the filing of the charge through the enforcement of the order by a Court of Appeals, usually takes about three years. Since the liability to refund the dues begins to run from the date six months preceding the filing of the charge, an enforced refund order against a local union of two thousand members paying four dollars per month would require the repayment of $280,000 plus initiation fees received during the period.

decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883 (currently pending in this Court). In that decision the Board formulated the three requirements for inclusion in agreements establishing referral system of employment.[14] Significantly, however, the order in *Mountain Pacific* did *not* require the refund of dues and fees, thus showing that as of the date of that decision, April 1, 1958, the Board did not deem reimbursement essential to an effective remedy in a referral system situation.

The *Mountain Pacific* case involved an exclusive hiring hall arrangement. The application of the Brown-Olds remedy in this case reflects an effort on the part of the Board to extend the standards formulated in *Mountain Pacific* to a non-exclusive hiring hall situation. In effect, this constitutes an administrative effort to overrule the judicial approval accorded non-exclusive referral systems. See, Point II, *supra*. At the same time, the Board is attempting to utilize the standards formulated in *Mountain Pacific* as a vehicle for extending the Brown-Olds decision (where

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[14] The three requirements are:

1. Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements.

2. The employer retains the right to reject any job applicant referred by the union.

3. The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

the agreement provided for a closed shop) to the instant case involving an open shop situation.[15]

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[15] In *Virginia Electric and Power Co.* v. *NLRB,* 319 U.S. 533, the Supreme Court held that an order requiring the refund of dues and fees was within the Board's power and that exercise of that power was within the Board's discretion in the particular circumstances of that case. The ruling circumstances in *Virginia Electric* was the company-dominated character of the union. The rationale extended to active support of the Union by the employer which, although short of domination, was so serious as effectively to impair the union's independence (*NLRB* v. *Parker Brothers,* 209 F. 2d 278, (CA 5)), and this was essentially the situation in *Broderick Wood Products Co.,* 118 NLRB 38, enforced, 261 F. 2d. 548 (CA 10). In all other cases a refund order was entered only in favor of employees specifically found to have been individually coerced into paying fees and dues. *NLRB* v. *Local 404,* 205 F. 2d 99, 101, 102, n. 2 (CA 1), enforcing, 100 NLRB 801, 809, 811, 812; Board Member Peterson dissenting in *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594, 605-606.

The Board began to withdraw from the judicially established criterion of domination or its virtual equivalent in *Hibbard Dowel Co.,* 113, NLRB 28, where it appears to have founded a refund order solely on the contracting union's lack of majority status at the time of its original entry into the union security agreement. See also, *Bryan Mfg. Co.,* 119 NLRB 502, enforced, CADC No. 14257, February 27, 1959.

The Board took its next step in *Brown-Olds Plumbing and Heating Corp.,* 115 NLRB 594, where the representative status of the contracting union was undisputed, but where the agreement it entered into provided for a closed shop, a form of union security in excess of the maximum permissible under the Act. The Board founded the refund order upon the closed shop feature of the agreement and disregarded the untrammelled character of the union's majority status.

There has thus been a progressive watering down of the conditions deemed essential for imposing the refund remedy from the original stringent requirement of domination or its virtual equiv-

The wedding of *Mountain Pacific* and *Brown-Olds* and the coercive and punitive character of the latter as a "spur" to contracting parties "to conform their . . . hiring practice to the requirements of *Mountain Pacific,* has been made manifestly clear. As the General Counsel stated in an address at the 1959 Southeast Trade Exposition on March 21, 1959, "It was . . . in the *Los Angeles-Seattle Motor* case [that the Board] linked *Mountain Pacific* to the *Brown-Olds* rationale" (mimeo. copy, p. 6). He stated in the same address that "The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their collective agreements and hiring practices to the requirements of *Mountain Pacific.* In this respect, the major spur has been the so-called *Brown-Olds* remedy . . ." (*id.* at p. 5) The spur was identified as "imposing a liability which may involve substantial sums of money" (*id.* at p. 7), and, he stated, "deterrence is the underlying consideration" (*id.* at p. 8).

This theme has been emphasized by the General Counsel

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alent. As the General Counsel of the Board has explained, what the Board has done "was to extend the broad reimbursement order, theretofore reserved for Section 8(a) (2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM, 101, 102.

We believe that the judicial attitude is still that expressed by the Coard of Appeals for the Second Circuit: "The validity of reimbursement orders necessarily depends upon the peculiar circumstances of each case." (*NLRB* v. *Adhesive Products Corp.,* 258 F. 2d 403, 409); refund orders will not be upheld where based on generalizations which fail realistically to reflect the actual situation (*NLRB* v. *McGough Bakeries Corp.,* 153 F. 2d 420, 425 (CA 5); *NLRB* v. *Shedd-Brown Mfg. Co.,* 213 F. 2d 163, 170-171 (CA 7); *NLRB* v. *Braswell Motor Freight Lines,* 213 F. 2d 208 (CA 5).

in repeated speeches. In an address to the Building Industry Employees of New York State on June 27, 1958, he stated: "The purpose of the Board in fashioning the Brown-Olds reimbursement remedy is to effectuate the policies of the Act by prevailing upon employers and unions to correct their illegal union-security arrangements" (42 LRRM 101, 103). In an address to the Illinois State Bar Association on November 7, 1958, he referred to the Brown-Olds remedy as "the first time employers and unions were to be held liable in a monetary sense for illegal union security or hiring arrangements. This liability potentially involves substantial sums of money . . ." (mimeo. copy, p. 4).

But the frankest avowal of the coercive and punitive character of the Brown-Olds remedy was given by the General Counsel in an address to Rutgers University Conference on September 30, 1958. He stated that the "use that has been made of this extraordinary remedy . . . demonstrates vividly the capabilities of administered pressure and persuasion . . ." (mimeo. copy, 6). He observed that "if employers and unions are to avoid serious consequences, these illegal arrangements must be eliminated. Liability potentially involves substantial sums of money . . ." (*id.* at p. 7,) He stated that, as the parties became aware of the "serious monetary risk" they ran, they undertook to conform their agreements to the Board's requirement, and during this time "over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full" (*ibid*). He concluded that, in withholding the refund remedy during the period of the moratorium and threatening to impose it thereafter, "we paid heed to the homely adage of one of our very own citizens, who practiced what he preached at the turn of this twentieth century. I refer to President 'Teddy' Roosevelt. He carried a 'big stick' and with it he went far. We spoke softly and carried a 'big sword', and the results to date have been heartening" (*id.* at p. 8).

These sentiments were echoed by Board Member John H. Fanning, who, in referring to the refund order in a hiring hall case, stated that the Board "put teeth into the law . . ." (Address to the American Society for Personnel Administration at Jacksonville, Florida, February 6, 1959, p. 8).

It is patent that the Board is exercising punitive power, although the power it has is "remedial, not punitive." It is patent that the Board is imposing a penalty to coerce compliance, but the "Act does not prescribe penalties or fines." And when the General Counsel states, as he does, that "deterrence is the underlying consideration", it suffices to say, with the Supreme Court, that "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp.* v. *NLRB,* 311 US 7, 12.

2. Apart from the inappropriateness of the Order issued herein because of the punitive nature of the remedy invoked, the order should be set aside because the Board did not have the power to issue a broad cease and desist order requiring the union to cease certain violations not only as to the employer named in the complaint but also as to "any other employer" when there was no threat made by the union to engage in illegal practices with respect to "any other employer". See *International Brotherhood of Teamsters, Local 554* v. *NLRB,* 262 F. 2d 456 (CADC) "In cases involving such broad orders the Board not only must make a finding based upon substantial evidence on the record as a whole that the blanket order is required but it must also convince the Court that such an order is needed" (*id.* at 462) In the instant case no such finding has been made and, we submit, there is no substantial evidence which would support such a finding. Indeed

the order has been so broadly drawn as to be patently absurd, as evidenced by the language of Paragraph B(1) (a) of the order which requires the union to cease and desist from "maintaining or otherwise giving effect to, any understanding, arrangement, or practice . . . *with any other employer,* whereby applicants for employment must become members of, and obtain clearance or dispatch slips from, Local 341 *as a condition of employment with Morrison-Knudsen*" (R. 87) (Italics supplied).

Under the circumstances of the instant case wherein the Board found that illegal acts were committed only with respect to part of the operations of a single employer (the Western Electric contract), the issuance of a desistance order with respect to "any other employer" is singularly inappropriate. This is not a situation analogous to that found in *NLRB* v. *Sun Tent-Luebert Co.,* 151 F. 2d 483 (CA 9), wherein this Court enforced a broad order based on a Board finding that the unfair labor practices were committed as part of a coordinated plan to assist all employers in restraining and coercing employees in the exercise of their rights. In that case the record showed a general attitude from which the Board inferred an intent to nullify the Act for all employers and employees in Southern California, thus indicating that the future commission of proscribed acts might be anticipated. Under such circumstances, a broad order was warranted but, here, there is an absence of any evidence which even suggests a general attitude or conduct to violate the provisions of the Act in the future or on an extensive scale and, accordingly, a broad order is not warranted, See *Richfield Oil Corporation* v. *NLRB,* 143 F. 2d 860 (CA 9).

This view is in accord with the decision in *Bee Lines Mfg. Co.* v. *NLRB,* 125 F. 2d 311 (CA 7); *NLRB* v. *Ford Motor Co.,* 119 F. 2d 326 (CA 5); *Shell Oil* v. *NLRB,* 196 F. 2d 637 (CA 5); *NLRB* v. *Cleveland Cliffs Iron Co.,* 133 F. 2d 295 (CA 6); *NLRB* v. *Dallas General Drivers, Local*

745, 228 F. 2d 702, (CA 5); *NLRB* v. *Youngstown Mines Corp.*, 123 F. 2d 178 (CA 8); *Joy Silk Mills, Inc.* v. *NLRB*, 185 F. 2d 732 (CADC) cert. den. 341 U.S. 914. The decisions to the contrary (such as *NLRB* v. *United Mine Workers, District 2*, 202 F. 2d 177) are not in point since they involve situations in which the record contained actual evidence from which the danger of future commission of unlawful acts could reasonably be anticipated as to other employers.

3. The Board also exceeded its power in issuing a desistance order which requires the Union to cease and desist from "*in any other manner* restraining or coercing employees" in the exercise of their Section 7 rights (italics supplied). As the Supreme Court pointed out in *NLRB* v. *Express Publishing Co.*, 312 US 426, the authority conferred on the Board to restrain the unfair labor practice which it has found an employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor related to the proven unlawful conduct. The fact that an act has been committed in violation of the statute does not justify a broad order which subjects the union to contempt proceedings if it shall at any future time commit some new violation unlike and unrelated to that with which it was originally charged. "The breadth of an order like the injunction of a court must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past" (*id.* at 436-7).

Here the Board made no finding and there is nothing in the record to suggest that the utilization of a dispatching service which the Board regards as violative of the Act indicates that in the future the Union would engage in all or any of the numerous other unfair labor practices defined by the Act.

Under the principles enunciated by the Supreme Court in the *Express Publishing case, supra,* and *May Department Stores Co.* v. *NLRB,* 326 US 376, we submit that the Board was without authority to order the Union to cease and desist from "in any other manner" restraining employees in the exercise of their Section 7 rights. See also *NLRB* v. *Crompton Highland Mills,* 327 US 217; *NLRB* v. *McGraw Co.,* 206 F. 2d 635 (CA 6).

The propriety of the Board's order, however, should not be analyzed solely from a stark legal standpoint. It is sweeping, technical and punitive in nature with serious adverse implications, from a practical viewpoint, for the Nation's security. Whatever the considerations may be which would justify such an order in a case involving construction projects elsewhere in the United States, such considerations are not pertinent here. The problems of recruitment of qualified manpower to meet urgent defense requirements in remote areas where skilled labor is scarce or nonexistent cannot be solved by the imposition of restrictions which make employer-union cooperation well nigh impossible. It is essential for a full appreciation of what occurred herein for this Court to bear in mind the unusual circumstances under which construction work is performed in Alaska. It is strange, indeed, for the Board to have accorded such significance to the atypical circumstances surrounding the hiring of five college students for temporary summer employment and to have ignored the normal circumstances and difficulties surrounding the employment of qualified experienced construction laborers in Alaska.

This case began with a charge that local natives had been denied employment on White Alice Site No. 2 (Big Mountain) because they were not members of the Union, pursuant to an illegal arrangement with the Company which required it to give preference to Union members. The charge had no merit. Not only were local natives not denied employment or required to become members of

the Union before employment, but even after being hired they were not required to join the Union, even though many did join voluntarily.

The General Counsel dredged up an unusual isolated incident involving the temporary summer employment of five non-experienced college students who were hired in the State of Washington, and the Board selected parts of it as the predicate for finding a general closed shop arrangement between the Union and the Company on open shop projects, and ordered reimbursement of dues and initiation fees to all employees (not only the college students) who had been dispatched by the Union from Anchorage. But while the Board relied upon this isolated atypical incident it failed utterly to consider the peculiar needs of the construction industry in Alaska and the havoc which will be wrought by its blanket order and "disgorgement" remedy if enforced.

Construction is the largest industry in the United States. Building and construction in Alaska is highly, if not completely, organized, and has been for many years past. Its local unions are few, covering vast territories stretching into the Aleutian redoubt, and each represents a pool of skilled, experienced construction workers. Its projects ordinarily arise in remote, virtually inaccessible and uninhabited frontiers and are ordinarily of a highly complex defense nature. Its construction season is of short duration. To its sponsors, ordinarily the Federal Government, and to its contractors it poses prodigious problems of assembling men and equipment on a remote job site on short notice, which involves logistics of transportation, materials and recruiting skilled manpower. The projects involved here were not the usual construction projects, but the building of intricate, highly complex, unique, specialized structures of a nature too secret to unfold in the Record. These projects were urgently needed, without delay, to mesh with the existing defense system upon which the survival of this land could well depend. The govern-

ment expected that the Union would cooperate fully with the Company, at arms length, to facilitate the speedy building of workable intricate facilities. This was their duty. They did no more. The Union's dispatching service performed a vital, almost indispensable function, drawing upon a pool of skilled, experienced workers, on short notice. Simply speaking, there was no other place where the employer could go to recruit qualified workers on short notice. Had the Union in this case denied Wargny, an obviously new personnel man, experienced neither with Alaska nor with qualifications required to fulfill requests from site superintendents, the use of its dispatching service, it is highly reasonable to assume that the projects would neither have been properly nor promptly completed.

As a result of the manner in which a company official may have handled the college students, the Union has been served with a refund order, and a blanket ban whereby any incident anywhere on the part of a Company or Union may subject it to a contempt proceeding.

It can be reasonably anticipated that this and other union hiring halls operating under the peril of this dual "Sword of Damocles" will cease its function as an indispensible component of the system of production for construction in Alaska, serving the national defense and will relegate itself to acting as the bargaining agent for the employees at contract time, representing individual grievances after disputes occur, and collecting dues and initiation fees under checkoff under a union shop provision. While Government Defense Agencies on the one hand, constantly proclaim that the defense outlook is grave, the hour is late and that this emergency requires the closest type of cooperation between labor and management in preventing labor disputes, and in recruiting skilled, experienced workers upon request, the Board applies the ritualistic remedies of disgorgement and blanket bans which can serve no other end but to abort the true responsibilities of the Unions and drive them into hollow mechanistic dues collection agencies and bargaining representatives.

CONCLUSION

The Order of the Board should be set aside.

Respectfully submitted,

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Gordon Hartlieb

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Vincent F. Morreale

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Robert J. Connerton

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